FLEXSOFT TECHNOLOGY SDN BHD v. FIRST E-FORMATICS SDN BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU
EVROL MARIETTE PETERS JC
[SUIT NO: JA-22IP-1-01-2019]
7 MARCH 2020

INTELLECTUAL PROPERTY: *Copyright – Infringement – Infringement of copyright in computer software – Authorised dealer sold software bearing substantial similarities to software belonging to claimant – Whether software eligible for copyright protection – Who owned copyright in software – Whether claimant owner and author of works in software – Whether there were efforts expended in developing software – Whether there was infringement of copyright in software – Whether alleged infringement of copyright caused unlawful interference with claimant's trade and business – Whether claimant entitled to reliefs claimed for – Copyright Act 1987, ss. 7(2A), 36, 37(1)(d), (7) & 42*

TORT: *Unlawful interference – Unlawful interference with trade and business – Copyright infringement – Computer software – Authorised dealer sold software bearing substantial similarities to software belonging to claimant – Whether claimant owner and author of works in software – Whether there was infringement of copyright in software – Whether there was unlawful interference with claimant's trade and business – Whether claimant entitled to reliefs claimed for*

The first and second defendants were companies that ran the business of selling computers, software and computer accessories. The third and fourth defendants were the directors of the first defendant while the fifth defendant was the director of the second defendant. The first defendant was appointed by the plaintiff, a company that develops software, as the plaintiff's authorised dealer to sell the plaintiff's software known as 'FLEXILITE POS' ('software'). According to the plaintiff, it was the owner of the copyright in the software. However, the plaintiff later discovered that the first defendant sold a software known as XPOSMART WIFIPOS which bore substantial similarities to the plaintiff's software and this amounted to infringement of its copyright in the plaintiff's software, as stipulated in s. 36(1) of the Copyright Act 1987 ('Act'). The plaintiff had obtained a consent judgment against the second and fifth defendants before the trial commenced. Against the first, third and fourth defendants, the plaintiff claimed for, *inter alia*: (i) a declaration that the defendants had infringed the plaintiff's copyright in its software; (ii) an injunction to prevent the defendants from using or dealing in any way, whatsoever, the XPOSMART WIFIPOS; (iii) an order for the defendants to publish in the China Press and Sin Chew, within 14 days, an apology to be approved by the plaintiff; (iv) an order for the plaintiff to be

given the liberty to use any document as a result of obtaining this order, for the further protection of its right in any action in Malaysia or elsewhere; (v) damages in the amount or RM800,000; (vi) general damages or, at the option of the plaintiff, statutory damages pursuant to s. 37(1)(d) of the Act; and (vii) additional damages pursuant to s. 37(7) of the Act and/or exemplary damages. The defendants raised preliminary objection that although the plaintiff's software was adduced and displayed to the court, it was neither marked as an exhibit nor referred to specifically. The defendants denied copying the plaintiff's software and argued that, *inter alia*, (i) there was no originality of the software as there were hundreds of similar software available in the market; and (ii) the software was a joint development by the plaintiff and the first defendant where both parties had agreed to sell the programme under their respective trade names. The issues that arose for adjudication were (i) whether the plaintiff's software was eligible for copyright protection; (ii) whether the plaintiff owned the copyright in the plaintiff's software; (iii) whether the defendants had infringed the plaintiff's copyright to the software; and (iv) whether there was unlawful interference with the plaintiff's trade and business.

Held (allowing claim with modifications to reliefs for damages):

(1) The defendants' preliminary objection was a non-starter since the parties had agreed, at the commencement of the trial, not to tender and mark each and every document referred to in the trial as an exhibit unless it was converted into an exhibit from Part C. The plaintiff's software had been exhibited and tendered through the shareholder and director of the plaintiff ('SP4'). There was no issue of whether this was the actual product of the plaintiff. (para 17)

(2) Although a computer program is a literary work and eligible for copyright protection, there is no copyright claim to any function of a computer program. This is because a function of a computer program constitutes an 'idea' under s. 7(2A) of the Act and is therefore, not entitled to copyright protection. The vital criterion that must be established for eligibility for copyright protection is that sufficient effort had been expended on the work to make it original and that such work had been reduced to material form. In his evidence, SP4 had explained the work flow, beginning with collecting the requirements from the customer, creating the structure of the form, adding icons and words and switching the form to program. In the process of writing the program, SP4 explained that there were almost 200 functions, which resulted in the creation of between 500,000 and 1,000,000 lines of codes. SP4 further explained that in writing these, he had to ensure that the presentation and business logic inside the code were synchronised.

Efforts were also expended in creating the graphic interface of the software. SP4 further explained that developing a software was not elementary as it involved analysing, designing, programming, testing and debugging. It encompassed various stages, beginning with envisioning and conceptualising and proceeding to the stages of creating, modifying and enhancing. There was no reason to disbelieve SP4. The originality of the plaintiff's software by virtue of the efforts expended, was further corroborated by an expert witness in computer software and another shareholder and director of the plaintiff. Based on evidence adduced, sufficient efforts had been expended to make the plaintiff's software 'original in character' within the meaning of s. 7(3)(a) of the Act and that the drawings had been reduced to 'material form' as required by s. 7(3)(b) of the Act. (paras 23, 25, 27, 30, 31 & 34)

(3) The plaintiff contended that copyright was vested in it by virtue of the statutory declaration made by SP4 on the plaintiff's behalf, pursuant to s. 42 of the Act. The statutory declaration was not accepted as *prima facie* evidence of proof of its copyright simply because it was signed on 13 May 2019 while this action was instituted in January 2019. Since s. 42 refers to 'at the time specified therein', this would mean that there was no *prima facie* proof of the plaintiff's copyright in the plaintiff's software at the time this action was instituted. However, although s. 42 provides a means of proof, it is not the only means of proving copyright for, other than by affidavit or statutory declaration, a person claiming copyright is allowed to adduce oral evidence or other evidence, the admission of which is not precluded by the Act. Since the plaintiff had proved it was the author of the software through the efforts of SP4, this rendered the plaintiff the author of the work as prescribed by the Act. By virtue of s. 26 of the Act, therefore, the plaintiff, as the author of the work, was also the owner. (paras 35-37 & 40)

(4) The defendants' argument on the joint development was unsubstantiated as it was a clear departure from the pleadings. There was no mention of any joint development in the defendants' defence. Parties are bound by their pleadings and are not allowed to stray from the same. This was an afterthought by the defendants to explain the substantial similarities between the first defendant's XPOSMART WIFIPOS and the plaintiff's software. (para 56)

(5) Based on (i) the degree of objective similarity between the two works; and (ii) the causal connection between the plaintiff's software and the first defendant's XPOSMART WIFIPOS, since the first defendant was the plaintiff's former distributor/dealer for the plaintiff's software, there was an infringement of copyright by the first defendant by virtue of

A s. 36(1) of the Act, which states that copyright is infringed by any person who does, without the licence of the owner of the copyright, an act of the doing of which is controlled by copyright under this Act. In view of the fact that the third and fourth defendants were the directors of the first defendant at all material times and, therefore, the controlling mind
B and will of the management and operation of the first defendant, they had effectively caused the first defendant to infringe the copyright of the plaintiff as they were in the position to order and direct the first defendant to commit such infringement. The liability of the third and fourth defendants would, therefore, fall within the second limb of
C s. 36(1) of the Act. (paras 69 & 72)

(6) The plaintiff had discharged the legal burden, on a balance of probabilities, that the defendants had committed the tort of unlawful interference with the plaintiff's business. This decision was premised on the following evidence and reasons: (i) the defendants had interfered
D with the plaintiff's business by copying the plaintiff's software and changing the plaintiff's software logo to that of the first defendant's company logo and presenting it as their own; (ii) the defendants had done this deliberately and intentionally, in the absence of any form of joint development between the plaintiff and the first defendant; and
E (iii) the plaintiff was injured by the above unlawful interference by the defendants since the plaintiff had expended a great deal of time, money and effort to develop the software. (para 75)

(7) The following items were allowed (i) a declaration that the defendants had infringed the plaintiff's copyright in the software; (ii) an injunction
F to prevent the defendants from using or dealing in any way, whatsoever, the XPOSMART WIFIPOS software; (iii) an order for the defendants to publish in the China Press and Sin Chew, within 14 days, an apology to be approved by the plaintiff; and (iv) an order for the plaintiff to be given the liberty to use any document as a result of obtaining this order
G for the further protection of its right in any action in Malaysia, or elsewhere. Modifications were made relating to damages. Since the plaintiff claimed additional damages pursuant to s. 37(7) of the Act, a global sum of RM200,000 for both additional and exemplary damages was a fair and just amount. Further to additional and exemplary
H damages, the following reliefs were granted: (i) damages based on the accounts of profits attributable to the infringement, pursuant to s. 37(3) of the Act; and (ii) statutory damages to be assessed based on the number of infringing copies to be ascertained. (paras 77-79)

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Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***

Alfa Laval (M) Sdn Bhd v. Ng Ah Hai & Ors [2009] 7 CLJ 1 HC ***(refd)***

Arensi-Marley (M) Sdn Bhd v. Middy Industries Sdn Bhd & Ors [2009] 9 CLJ 771 HC ***(refd)***

Browne v. Dunn [1893] 6 R 67 ***(refd)***

Chan Kwee Fong v. PP [2010] 3 CLJ 671 CA ***(refd)***

Chuah Aik King v. Keydonesoft Sdn Bhd [2018] 10 CLJ 354 HC ***(refd)***

Creative Purpose Sdn Bhd & Anor v. Integrated Trans Corporation Sdn Bhd & Ors [1997] 2 CLJ Supp 107 HC ***(refd)***

Designers Guild Ltd v. Russell Williams (Textiles) Ltd [2000] 1 WLR 2416 ***(refd)***

Dura-Mine Sdn Bhd v. Elster Metering Ltd & Anor [2015] 1 CLJ 887 FC ***(refd)***

Elster Metering Limited & Anor v. Damini Corporation Sdn Bhd & Anor [2012] 1 LNS 959 CA ***(refd)***

Excelerate Technology Ltd v. Cumberbatch And Another [2015] EWHC 204 ***(refd)***

Francis Day & Hunter v. Bron [1963] Ch 587 ***(refd)***

H & R Johnson (Malaysia) Bhd v. H & R Johnson Tiles Limited & Anor [1995] 2 CLJ 581 HC ***(refd)***

Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC ***(refd)***

Junaidi Bambang v. PP [2011] 3 CLJ 484 CA ***(refd)***

Lai Yong Koon v. PP [1962] 1 LNS 74 HC ***(refd)***

Megnaway Enterprise Sdn Bhd v. Soon Lian Hock (No. 2) [2009] 8 CLJ 130 HC ***(refd)***

Mohd Syamsul Md Yusof & Ors v. Elias Idris [2019] 7 CLJ 560 FC ***(refd)***

Motordata Research Consortium Sdn Bhd v. Ahmad Shahril Abdullah & Ors [2017] 1 LNS 1142 HC ***(refd)***

Onestop Software Solutions (M) Sdn Bhd & Anor v. Masteritec Sdn Bhd & Ors [2009] 1 LNS 287 HC ***(refd)***

Petraware Solutions Sdn Bhd & Anor v. Readsoft Aktielbolag & Anor [2014] 1 AMCR 112 ***(refd)***

Poraviappan Arunasalam Pillay (Sebagai Pentadbir Harta Pesaka Nadarajah Sithambaram Pillai) v. Periasamy Sithambaram Pillai & Anor [2015] 6 CLJ 857 FC ***(refd)***

PP v. Yiau Swee Tung [1998] 1 LNS 355 HC ***(refd)***

Rookes v. Barnard [1964] AC 1129 ***(refd)***

SAS Institute Inc v. World Programming Ltd [2013] EWHC 69 ***(refd)***

Sim Ah Song & Anor v. Rex [1951] 1 LNS 83 HC ***(refd)***

United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

Wong Chop Saow v. PP [1964] 1 LNS 218 HC ***(refd)***

Yiau Swee Tung [1998] 1 LNS 355 HC ***(refd)***

Legislation referred to:

Copyright Act 1987, ss. 3, 6, 7(1)(a), (2A), (3)(a), (b), 26, 36(1), 37(1)(d), (3), (7), 42

Evidence Act 1950, ss. 45, 51, 101, 103

Rules of Court 2012, O. 40A r. 3

For the plaintiff - SC Tay & TH Yeoh; M/s Ismail Sabri Wee & Wong

For the 1st, 3rd & 4th defendants - G Ravi & C Sivasankar; M/s G Ravi

Reported by Najib Tamby

A

JUDGMENT

Evrol Mariette Peters JC:

The Brief Facts

B **[1]** The plaintiff, a company incorporated in Malaysia, runs the business of software development, and claims to be the owner of the copyright in a point-of-sale computer programme known as "FLEXILITE POS".

[2] The first defendant is a company that runs the business of selling computers, software and computer accessories. The third and fourth defendants are directors of the first defendant company.

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[3] The second defendant is also a company that runs the business of selling computers, software and computer accessories. The fifth defendant is the director of the second defendant company.

[4] The first defendant was appointed as the plaintiff's authorised dealer since 2005 to sell the plaintiff's FLEXILITE POS software (evidenced by correspondences by the first defendant to the plaintiff, exhibited at p. 1613 of vol. C6 of the common bundle of documents ("CBD")).

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[5] In 2017, the plaintiff discovered that the software sold by the first defendant under the name "XPOSMART WIFIPOS", bore substantial similarities to the plaintiff's FLEXILITE POS software.

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The Claims

[6] The plaintiff had obtained consent judgment against second and fifth defendants before the trial commenced.

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[7] The plaintiff's claim against the first, third and fourth defendants (collectively "the defendants") were for, *inter alia*, the following:

(i) A declaration that the defendants had infringed the plaintiff's copyright in its FLEXILITE POS software;

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(ii) An injunction to prevent the defendants from using or dealing in any way, whatsoever, the XPOSMART WIFIPOS software;

(iii) An order for the defendants to publish in the China Press and Sin Chew, within 14 days, an apology to be approved by the plaintiff;

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(iv) An order for the plaintiff to be given the liberty to use any document as a result of obtaining this order, for the further protection of its rights in any action in Malaysia, or elsewhere;

(v) Damages in the amount of RM800,000;

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(vi) General damages or, at the option of the plaintiff, statutory damages pursuant to s. 37(1)(d) of the Copyright Act ("the Copyright Act");

(vii) Additional damages pursuant to s. 37(7) of the Copyright Act, and/or exemplary damages.

[8] I allowed the plaintiff's claims with the necessary modifications made to the reliefs for damages, and the following are my reasons.

The Plaintiff's Case

[9] Sometime in 2017, through an entrapment purchase by one of its employees (evidenced by tax invoice dated 7 August 2017 for RM4760, exhibited at pp. 1621-1622 of vol. C6 of the CBD), the plaintiff had discovered that the first defendant's "XPOSMART WIFIPOS" software bore substantial similarities to the plaintiff's FLEXILITE POS software.

[10] The plaintiff claimed that these similarities amounted to infringement of its copyright in the FLEXILITE POS software, as stipulated in s. 36(1) of the Copyright Act, which reads:

> Section 36 - Infringements
>
> (1) Copyright is infringed by any person who does, or causes any other person to do, without the licence of the owner of the copyright, an act the doing of which is controlled by copyright under this Act.

[11] The plaintiff called the following as its witnesses:

(i) Lee Jer Shin (SP1), the trap witness, and also the employee of the plaintiff;

(ii) Lew Shen Hee (SP2), an employee of the plaintiff company;

(iii) Ling Shian Yee (SP3), an expert witness on computer software;

(iv) Lee Ken Hong (SP4), shareholder and director of the plaintiff company;

(v) Shiu Huol Rung (SP5), shareholder and director of the plaintiff company

The Defendants' Case

[12] The defendants denied copying the plaintiff's FLEXILITE POS software, and their pleaded case was that they had provided after-sales services to the customers of the plaintiff's FLEXILITE POS software.

[13] The defendants claimed to have enhanced the popularity of the FLEXILITE POS software in the market, and that the plaintiff had taken advantage of the defendants' good reputation in Johor Bahru by getting the defendants to introduce the customers to the plaintiff.

[14] The defendants had also disputed the plaintiff's claim to authoring the FLEXILITE POS software, and contended that there was no originality in the product, as there were 'hundreds of similar software available in the market'.

[15] The defendants called the following as their witnesses:

(i) Ng Choong Wan (SD1), the third defendant;

(ii) Gui Lee Chan (SD2), the fourth defendant

Contentions, Evaluation And Findings

Preliminary Issue On Whether Every Document Should Be Marked As Exhibit

[16] At the outset, counsel for the defendants submitted that although the plaintiff's FLEXILITE POS software was adduced and displayed to the court by SP4, it was neither marked as an exhibit, nor referred to specifically.

[17] In my view, this argument was a non-starter, since parties had agreed, at the commencement of the trial, not to tender and mark each and every document referred to in the trial as an exhibit, unless it was converted into an exhibit from part C. The FLEXILITE POS software version 5.0 had been exhibited at p. 1596 of vol. C6 of the CBD and tendered through SP4, and there was, therefore, no issue of whether this was the actual product of the plaintiff.

Whether Plaintiff's FLEXILITE POS Software Was Eligible For Copyright Protection

[18] The first issue for consideration was whether the plaintiff's FLEXILITE POS software was eligible for copyright protection. The starting point is s. 6 of the Copyright Act, which reads:

> Section 6 - No copyright except by virtue of this Act
>
> Subject to this Act, no copyright shall subsist otherwise than by virtue of this Act.

[19] Since the issue concerned copyright in the plaintiff's FLEXILITE POS software, the definition of 'computer program' in s. 3 of the Copyright Act was relevant. The section reads:

> Section 3 - Interpretation
>
> "computer program" means an expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended to cause a device having an information processing capability to perform a particular function either directly or after either or both of the following:
>
> (a) conversion to another language, code or notation;
>
> (b) reproduction in a different material form;

[20] With regard to the eligibility of copyright protection, the relevant provision that contains the list of works eligible for such protection is s. 7 of the Copyright Act, which reads:

Section 7 - Works eligible for copyright

(1) Subject to this section, the following works shall be eligible for copyright:

(a) literary works;

(b) musical works;

(c) artistic works;

(d) films;

(e) sound recordings; and

(f) broadcasts.

[21] There is a plethora of authorities to say that a computer programme is a literary work, and therefore eligible for copyright protection. In *Creative Purpose Sdn Bhd & Anor v. Integrated Trans Corporation Sdn Bhd & Ors* [1997] 2 CLJ Supp 107; [1997] 2 MLJ 429, it was stated that a computer programme comprises source codes and non-literal elements which are protected under 'literary works' under s. 7(1)(a) of the Copyright Act.

[22] Reference was also made to *Onestop Software Solutions (M) Sdn Bhd & Anor v. Masteritec Sdn Bhd & Ors* [2009] 1 LNS 287, and *Chuah Aik King v. Keydonesoft Sdn Bhd* [2018] 10 CLJ 354.

[23] It must be noted that although a computer program is a literary work and eligible for copyright protection, there is no copyright claim to any function of a computer program. This is because a function of a computer program constitutes an "idea" under s. 7(2A) of the Copyright Act and is, therefore, not entitled to copyright protection. The section reads:

Section 7 - Works eligible for copyright

(2A) Copyright protection shall not extend to any idea, procedure, method of operation or mathematical concept as such.

[24] The aspects of copyright protection of a computer program were distilled in the Court of Appeal case of *Petraware Solutions Sdn Bhd & Anor v. Readsoft Aktielbolag & Anor* [2014] 1 AMCR 112, where in adopting the judgment of Arnold J in the English High Court in *SAS Institute Inc v. World Programming Ltd* [2013] EWHC 69, it was stated by Mohamad Ariff Md Yusof JCA:

The English High Court held [in SAS Institute] there was no infringement of copyright in a software where a second software merely reproduced the "functionality" in that second software without copying the source code or the user manual which embodied the elements of the software. It was

A argued before the court that accepting the functionality of a computer programme could be protected by copyright "would amount to making it possible to monopolise ideas, to the detriment of technological progress and industrial development."

On the facts of this appeal too, there was no evidence of copying of the
B structural design of the source code or the manuals. What the defendants created was, in our opinion, another data capture software which had a similar "functionality" with the plaintiffs' software. This outcome could not *per se* amount to an infringement of copyright. What else could the "system flow" be except a "functionality"? It was too basic to be accepted as a "structural design of the computer program."

C **[25]** The further vital criterion that must be established for eligibility for copyright protection is that sufficient effort had been expended on the work to make it original, and that such work had been reduced to material form. On this point, reference is made to s. 7(3) of the Copyright Act, which reads:

D Section 7 - Works eligible for copyright

(3) A literary, musical or artistic work shall not be eligible for copyright unless -

(a) **sufficient effort** has been expended to make the work original in character;

E and

(b) the work has been written down, recorded or otherwise **reduced to material form**.

(emphasis added.)

F **[26]** Evidence that sufficient work had been expended to render the work original, was given by several witnesses, namely SP3, SP4, and SP5.

[27] In his evidence, SP4, a director of the plaintiff, had explained the work flow (exhibited at pp. 4-15 of bundle C1 of the CBD) - beginning with collecting the requirements from the customer, creating the structure of the
G form, adding icons and words, and switching the form to program. In the process of writing the program, SP4 explained that there were almost 200 functions, which resulted in the creation of between 500,000 and 1,000,000 lines of codes. SP4 further explained that in writing these, he had to ensure that the presentation and business logic inside the code were synchronised.
H Efforts were also expended in creating the graphic interface of the FLEXILITE POS software.

[28] The diagram A below is the plaintiff's software development process flowchart:

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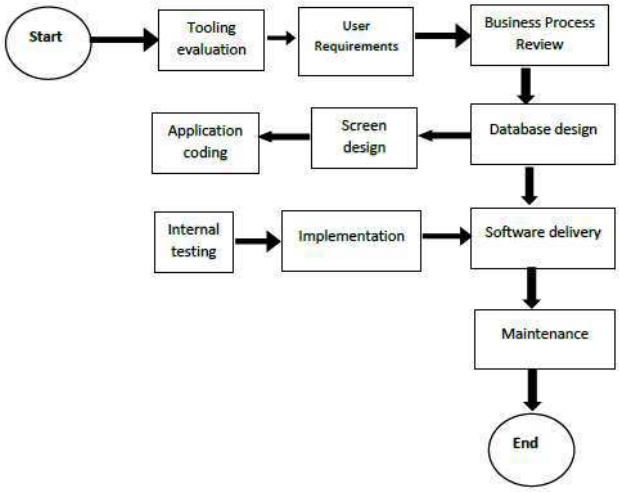
Diagram A



[29] I did not find any reason to disbelieve SP4. He was forthright and explained in detail, and with clarity, how he had reduced his ideas into material form. In doing so, he produced his diary (exhibited at pp. 72-1554 of vol. C1-C4 of the CBD) and referred to the notes he documented therein to explain how he had authored the program for the plaintiff's FLEXILITE POS software. Although counsel for the defendants argued that the diary contained mere scribbling which was incoherent and hardly legible, I am of the view that the focus should not be quantity, but quality. The notes themselves were not the subject matter of copyright protection, but were used merely as reference, and were personal to SP4. There was, therefore, no reason for the notes to be eligible to all and sundry.

[30] SP4 proceeded to explain that developing a software was not elementary, as it involved analysing, designing, programming, testing and debugging. It encompassed various stages, beginning with envisioning and conceptualising, and proceeding to the stages of creating, modifying and enhancing.

[31] The originality of the plaintiff's FLEXILITE POS software by virtue of the efforts expended, was corroborated by SP3 and SP5.

[32] SP5, also a director of the plaintiff, explained that much effort was spent on modifying and enhancing the plaintiff's FLEXILITE POS software, and this was based primarily on the coding. Counsel for the defendants, however, expressed his frustrations with SP5, and claimed that she was not a useful witness, and that she was feigning ignorance at some of his questions. I disagreed with that contention, as it was my view that the exasperation expressed by counsel for the defendants was due to the fact that the answers provided by SP5 were not favourable to the defendants.

[33] What is also pertinent to note is that in his cross-examination, SD1 himself had confirmed that the plaintiff's FLEXILITE POS software was written by SP4.

[34] Based on the evidence adduced aforesaid, it is my view that sufficient efforts had been expended to make the plaintiff's FLEXILITE POS software 'original in character' within the meaning of s. 7(3)(a) of the Copyright Act; and that the drawings had been reduced to 'material form' as required by s. 7(3)(b) of the Copyright Act.

Whether The Plaintiff Owned The Copyright In The FLEXILITE POS Software

[35] At the outset, the plaintiff contended that copyright was vested in it by virtue of the statutory declaration made by SP4 on behalf of the plaintiff (exhibited at pp. 79-83 of the plaintiff's bundle of documents), pursuant to s. 42 of the Copyright Act, which reads:

> Section 42 - Affidavit admissible in evidence
>
> (1) An affidavit, certified extracts of the Register of Copyright referred to in section 26B or statutory declaration made before any person having authority to administer oath by or on behalf of any person claiming to be:
>
> (a) the owner of the copyright in any works eligible for copyright under this Act stating that:
>
> (i) at the time specified therein copyright subsisted in such work;
>
> (ii) he or the person named therein is the owner of the copyright; and
>
> (iii) a copy of the work annexed thereto is the true copy thereof; or
>
> (b) the performer in a performance eligible for performers' right under this Act stating that:
>
> (i) at the time specified therein performers' right subsisted in such performance;
>
> (ii) he or the person named therein is the performer; and
>
> (iii) a copy of the document annexed thereto is the document which proves that he or the person named therein performed in the performance,
>
> shall be admissible in evidence in any proceedings under this Act and shall be *prima facie* evidence of the facts contained therein.
>
> (2) Any person who is authorised to act on behalf of the owner of the copyright or performer for the purposes of subsection (1) shall be required to produce such authorisation in writing.

[36] I did not accept the statutory declaration of the plaintiff as *prima facie* evidence of proof of its copyright, simply because it was signed on 13 May 2019, whereas this action was instituted in January 2019. Since s. 42 refers

to 'at the time specified therein', this would mean that there was no *prima facie* proof of the plaintiff's copyright in the FLEXILITE POS software at the time this action was instituted.

[37] Having said that, however, it must be noted that although s. 42 provides a means of proof, it is not the only means of proving copyright, for other than by affidavit or statutory declaration, a person claiming copyright is allowed to adduce oral evidence, or other evidence, the admission of which is not precluded by the Copyright Act: per Jeffrey Tan FCJ in *Dura-Mine Sdn Bhd v. Elster Metering Ltd & Anor* [2015] 1 CLJ 887.

[38] Without the aid of the statutory declaration in s. 42, therefore, the plaintiff has the legal burden to prove on a balance of probabilities, by virtue of s. 101 of the Evidence Act 1950 ("the Evidence Act") that it is the author and, therefore, the owner of the copyright to the FLEXILITE POS software. Section 101 of the Evidence Act reads:

Section 101 - Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[39] The plaintiff's ownership of the FLEXILITE POS software would, therefore, depend on whether it is the author. The meaning of author is provided for in s. 3 of the Copyright Act, which reads:

Section 3 - Interpretation

"author",:

(a) in relation to literary works, means **the writer or the maker of the works**;

(b) in relation to musical works, means the composer;

(c) in relation to artistic works other than photographs, means the artist;

(d) in relation to photographs, means the person by whom the arrangements for the taking of the photographs were undertaken;

(e) in relation to films or sound recordings, means the person by whom the arrangements for the making of the film or recording were undertaken;

(f) in relation to broadcasts transmitted from within any country, means:

(i) the person transmitting the programme, if he has responsibility for the selection of its contents; or

(ii) any person providing the programme who makes with the person transmitting it the arrangements necessary for its transmission;

(g) in relation to any other cases, means the person by whom the work was made;

[emphasis added.]

[40] Since the plaintiff had proved that it was the author of the FLEXILITE POS software through the efforts of SP4, this rendered the plaintiff the author of the work as prescribed by the Copyright Act. By virtue of s. 26 of the Copyright Act, therefore, the plaintiff, as the author of the work, is also the owner. Section 26 reads:

Section 26 - First Ownership of copyright

(1) Copyright conferred by section 10 shall vest initially in the author.

Whether The Defendants Had Infringed The Plaintiff's Copyright To The FLEXILITE POS software

[41] The manner in which copyright was infringed is provided for in s. 36 of the Copyright Act, which reads:

Section 36 - Infringements

(1) Copyright is infringed by any person who does, or causes any other person to do, without the licence of the owner of the copyright, an act the doing of which is controlled by copyright under this Act.

(2) Copyright is infringed by any person who, without the consent or licence of the owner of the copyright, imports an article into Malaysia for the purpose of:

(a) selling, letting for hire, or by way of trade, offering or exposing for sale or hire, the article;

(b) distributing the article:

(i) for the purpose of trade; or

(ii) for any other purpose to an extent that it will affect prejudicially the owner of the copyright; or

(c) by way of trade, exhibiting the article in public,

where he knows or ought reasonably to know that the making of the article was carried out without the consent or licence of the owner of the copyright.

[42] In the leading case of *Francis Day & Hunter v. Bron* [1963] Ch 587, Diplock LJ in the following paragraphs, had explained the elements to be proved for the purposes of establishing copyright infringement:

Nevertheless, it is well established that to constitute infringement of copyright in any literary, dramatic or musical work, there must be present two elements: first, there must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof,

for the former to be properly described, not necessarily as identical with, but as a reproduction or adaptation of the latter; secondly, the copyright work must be the source from which the infringing work is derived.

... there must be a causal connection between the copyright work and the infringing work. To borrow an expression once fashionable in the law of negligence, the copyright work must be shown to be a *causa sine qua non* of the infringing work.

[43] In *Megnaway Enterprise Sdn Bhd v. Soon Lian Hock (No. 2)* [2009] 8 CLJ 130, these elements were distilled by Low Hop Bing J as follows:

For purposes of direct infringement, it must be established that:

(a) there is **sufficient objective similarity** between the original work or a substantial part thereof, and the infringing copy;

(b) there is **a causal connection between** the original work and the infringing copy, that is, the infringing copy must have been copied from the original work, whether directly or indirectly; and

(c) what has been infringed must constitute a **substantial part of the original work**.

(emphasis added)

[44] The above cases have been assimilated into Malaysian jurisprudence through several cases including the Federal Court case of *Mohd Syamsul Md Yusof & Ors v. Elias Idris* [2019] 7 CLJ 560 and the Court of Appeal case of *Elster Metering Limited & Anor v. Damini Corporation Sdn Bhd & Anor* [2012] 1 LNS 959.

Whether There Was Objective Similarity Between The Plaintiff's FLEXILITE POS Software And The First Defendant's XPOSMART WIFIPOS

[45] In determining whether there was objective similarity between the plaintiff's FLEXILITE POS software and the first defendant's XPOSMART WIFIPOS, the evidence of SP3, the computer software expert, was crucial. He adduced evidence pursuant to s. 45 of the Evidence Act, which reads:

Section 45 - Opinions of experts

(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts.

[46] The procedure in establishing the expertise of SP3 prescribed by *Wong Chop Saow v. PP* [1964] 1 LNS 218; [1965] 1 MLJ 247, and *Chan Kwee Fong v. PP* [2010] 3 CLJ 671; [2010] 1 MLJ 441 was followed. SP3 was examined on his expertise and experience. Although this was the first time that he gave evidence in court as an expert, that fact did not affect the admissibility of his evidence.

[47] In my view, the evidence of SP3 remained unblemished even after being cross-examined by counsel for the defendants. SP3 inspired confidence and, in my view, remained consistent throughout. His evidence was not disputed, and he had taken the court through his grounds of evidence and went into minute details of the basis of his opinion regarding the similarities between the plaintiff's FLEXILITE POS software and the first defendant's XPOSMART WIFIPOS. SP3's report was exhibited as ML1, attached to his affidavit dated 19 September 2019, filed pursuant to O. 40A r. 3 of the Rules of Court 2012 which deals with experts of parties.

[48] A fundamental aspect of the evidence of an expert witness is the grounds on which he had formed his opinion. This is prescribed by s. 51 of the Evidence Act. The section reads:

> Section 51 - Grounds of opinion when relevant
>
> Whenever the opinion of any living person is relevant, the grounds on which his opinion is based are also relevant.

[49] The necessity to provide the grounds of opinion was emphasised by the Court of Appeal in *Junaidi Bambang v. PP* [2011] 3 CLJ 484, [2011] 3 MLJ 141, with reference to earlier cases such as *United Asian Bank Bhd. v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31; [1993] 1 MLJ 182, *Lai Yong Koon v. PP* [1962] 1 LNS 74, [1962] MLJ 327, *PP v. Yiau Swee Tung* [1998] 1 LNS 355, [1999] 3 MLJ 353, and *Sim Ah Song v. Rex* [1951] 1 LNS 83; [1951] 1 MLJ 150.

[50] In *Sim Ah Song*, the significance of having the grounds provided by the expert was emphasised by Brown A-G CJ:

> The business of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. He is quite entitled to express his opinion, which indeed is the natural corollary of his explanation. But a bare expression of his opinion has no evidential value at all. **Unless he gives an explanation which supplies the understanding of the subject which the Court lacks, the Court is in no better position than it was before to determine the question which it is its duty to determine**, and if the Court acts upon a bare expression of the expert's opinion the determination of the question becomes that of the expert and not of the Court.
>
> (emphasis added)

[51] In my view, therefore, SP3 had demonstrated sufficient degree of similarity between the two works. His evidence was supported by the evidence of SP4 on the objective similarity between the plaintiff's FLEXILITE POS software and first defendant's XPOSMART WIFIPOS. In fact, since SP4 was not cross-examined on these similarities, this amounted to the acceptance of his evidence by the defendants, by virtue of the principle

in the Court of Appeal case of *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; [1995] 1 MLRA 546, where in reference to *Browne v. Dunn* [1893] 6 R 67, it was stated:

> Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all.

[52] It is pertinent to note that SD1 himself had admitted during cross-examination, that there was substantial similarities in features, coding, interface and functions between the plaintiff's FLEXILITE POS software and the first defendant's XPOSMART WIFIPOS. By virtue of this fact, the burden is imposed on the defendants to satisfy the judge that such similarities were not the result of copying. On this point, I am guided by the House of Lords in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416, where it was stated:

> ... the first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. *It is at this stage that similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas. If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges to have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying*.
>
> (emphasis added)

[53] It was put to SP3, SP4 and SP5 by counsel for the defendants that the plaintiff's FLEXILITE POS software was not unique and it could be easily obtained from the commonplace. However, no proof of this fact was forthcoming, and since this particular fact was raised by the defendants themselves, they had the burden to prove it, as prescribed by s. 103 of the Evidence Act, which reads:

> Section 103 - Burden of proof as to particular fact
>
> The burden of proof **as to any particular fact** lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> (emphasis added)

[54] At this juncture, it is vital to note that in their defence, the defendants had pleaded that they had provided after sales services to the plaintiff's customers, and this, the defendants claimed, had enhanced the popularity of the plaintiff's FLEXILITE POS software in the market. Defendants further

alleged that the customers were introduced to the plaintiff by the third defendant himself, and that the plaintiff had taken advantage of the first defendant's reputation and goodwill in Johor Bahru.

[55] However, during trial, the defendants took a different route and claimed that the plaintiff's FLEXILITE POS software was a joint development by the plaintiff and first defendant, whereby both parties had agreed to sell the programme under their respective trade names. According to the defendants, the similarities, therefore, between the first defendant's XPOSMART WIFIPOS and the plaintiff's FLEXILITE POS software were due to the 'joint development' between the parties.

[56] In my view, this argument is unsubstantiated as first and foremost, it was a clear departure from the pleadings. There was no mention of any joint development in the defendants' defence, and it is trite law that parties are bound by their pleadings and are not allowed to stray from the same: *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415 and *Poraviappan Arunasalam Pillay (Sebagai Pentadbir Harta Pesaka Nadarajah Sithambaram Pillai) v. Periasamy Sithambaram Pillai & Anor* [2015] 6 CLJ 857. I, therefore, agreed with counsel for the plaintiff that this was an afterthought by the defendants, to explain the substantial similarities between the first defendant's XPOSMART WIFIPOS and the plaintiff's FLEXILITE POS software.

[57] Secondly, even if the 'joint development' argument was pleaded accordingly, the legal burden is on the defendants to prove such a fact, as prescribed by s. 103 of the Evidence Act, alluded to earlier.

[58] To support the joint development contention, the defendants relied on the MS DOS version and the purchase of the dongles, as the defendants' contribution to the development of the FLEXILITE POS software. SD1 alleged that he had provided the source code of its MS DOS version to the plaintiff.

[59] From the evidence of SP3, SP4, and even SD2, it was clear that the MS DOS version was an entirely different application from the FLEXILITE POS software. SP3 explained the differences between a disk-operating system (DOS) and a Windows system, where with regard to the latter, the command line and processing features are entirely different. The only common denominator between the plaintiff's FLEXILITE POS software and the defendants' MS Dos Version was the function.

[60] On this note, it is crucial to bear in mind that the functionalities of a programme is not eligible for protection under the Copyright Act by virtue of s. 7(2A) alluded to earlier, and as stipulated by Ramly Ali J (as he then was) in *Alfa Laval (M) Sdn Bhd v. Ng Ah Hai & Ors* [2009] 7 CLJ 1; [2008] 5 MLJ 344.

[61] SD1 further alleged that by purchasing dongles from the plaintiff, he had contributed to the development of the plaintiff's FLEXILITE POS software, rendering it a joint development between the first defendant and plaintiff.

[62] In my view, this contention is untenable, in view of the fact that purchasing the dongles from the plaintiff amounted to monetary contribution only, and that in itself did not render the first defendant the owner of its copyright, unless there was proof of an agreement to such effect, in which case, there was none.

[63] I am guided by *Arensi-Marley (M) Sdn Bhd v. Middy Industries Sdn Bhd & Ors* [2009] 9 CLJ 771, where it was stated by Hamid Sultan J (as he then was):

> No evidence was adduced to establish in law that the plaintiff was the actual copyright owner. The copyright the plaintiff was claiming was in respect of artistic work in relation to a gutter and not a drawing. There was no evidence to show that he was having copyright in the gutter and his copyright had been lawfully assigned to the relevant parties to allow the plaintiff to claim copyright in law taking into consideration that the plaintiff was not the original copyright owner on the facts of the case. The plaintiff in law could not have been the owner of copyright and had no *locus standi* to sue (s. 37(1) and (5) Copyright Act (CRA 1987).
>
> The copyright was never assigned to the plaintiff at any time or at all from the original owner of the copyright. It was never at any point established by the plaintiff to show who was the original owner of the artistic work relating to the gutter and how it was assigned from one person to another according to law. There was no assignment in law exhibited to show that *ad valorem* duty was paid.
>
> The fact that an employee of the plaintiff was only instrumental to have authored the packaging design did not entitle the plaintiff to claim copyright without showing actual proof of the full contribution to the packaging design (s. 26 CRA 1987). There was no sufficient objective similarity between the said infringing work and the said copyright work. Though there may be similarities in the idea under the prevailing copyright law, ideas are not protected.

[64] At this juncture, I am compelled to address the issue of dongles which counsel for the defendants had constantly referred to during the trial and also in his submission.

[65] It is pertinent to note that there is no software in the dongle itself. The dongle is part of the hardware to prevent software copying, since copying cannot be done by persons who are not in possession of such dongle. 'Thus dongles are a technical means to indirectly protect software against unauthorised copying. One can consequently conclude that dongles are used by authors in connection with their exercise of their right of reproduction':

Ian Walden and Julia Hornle - *E-Commerce Law and Practice in Europe*, 2001. The dongles, therefore, had nothing whatsoever to do with the copyright infringement by the defendants. Being in possession of the dongles only meant that the defendants had access to the plaintiff's FLEXILITE POS software, and not a *carte blanche* to copy or to pass off the plaintiff's FLEXILITE POS software as the first defendant's XPOSMART WIFIPOS.

[66] Although SD1 testified that both the plaintiff and defendants had agreed to continue to sell the programme under their respective trade names, he was unable to substantiate such claims. The only document he adduced was merely one invoice issued in 2005, which he alleged was proof of his cooperation with the plaintiff. This was, however, explained by SP4 that although the first invoice, issued ten years ago, was endorsed with the XPOSMART WIFIPOS logo, all subsequent invoices were issued in the name of FLEXILITE POS. In any event, just as one swallow does not make a summer, one invoice does not render the work a joint development or joint cooperation between the plaintiff and first defendant.

[67] Secondly, if the plaintiff's FLEXILITE POS software was indeed a joint development, the after sales service fees that the first defendant admitted having charged customers, should have been shared with the plaintiff, which had not been done.

[68] I found SD1 to be unconvincing and inconsistent. He denied facts which were supported by clear and undisputed documentary evidence. It is also pertinent to note that on many occasions during cross-examination, despite his proficiency in the English language, SD1 either repeated the questions to himself or asked counsel for the plaintiff to repeat the questions for him. This, in my view was one of the factors that compromised his credibility as it has been highlighted in *Excelerate Technology Ltd v. Cumberbatch And Another* [2015] EWHC 204, that in determining the credibility of a witness, the court should consider his frequent requests to repeat a question which may amount to buying time to think of a favourable answer. On the whole, I did not believe the narrative of SD1.

[69] Based on the following, namely, (a) the degree of objective similarity between the two works; and (b) the causal connection between the plaintiff's FLEXILITE POS software and the first defendant's XPOSMART WIFIPOS, since the first defendant was the plaintiff's former distributor/ dealer for FLEXILITE POS software, there was infringement of copyright by the first defendant by virtue of s. 36(1) of the Copyright Act, which states that copyright is infringed by any person who does, without the licence of the owner of the copyright, an act the doing of which is controlled by copyright under this Act.

[70] The subsequent issue was whether the third and fourth defendants had infringed the plaintiff's copyright. Reference is made to s. 36(1) of the Copyright Act, which reads:

> Section 36 - Infringements
>
> (1) Copyright is infringed by any person who does, or **causes any other person to do**, without the licence of the owner of the copyright, an act the doing of which is controlled by copyright under this Act.
>
> (emphasis added)

[71] In *Motordata Research Consortium Sdn Bhd v. Ahmad Shahril Abdullah & Ors* [2017] 1 LNS 1142, it was stated by Wong Kian Kheong JC, as he then was:

> ... I hold that a person (V) commits copyright infringement under the 2nd Limb [of section 36(1)] when V "causes" another person (W) to commit copyright infringement under the 1st Limb in the following circumstances:
>
> (1) V has authority over W and V orders or directs W to commit copyright infringement under the 1st Limb ...; or
>
> (2) V has an express or positive mandate to cause W to commit copyright infringement under the 1st Limb and V has caused W to do so ... .

[72] As such, and in view of the fact that the third and fourth defendants were directors of the first defendant at all material times, and therefore, the controlling mind and will of the management and operation of the first defendant, they had effectively caused the first defendant to infringe the copyright of the plaintiff, as they were in the position to order and direct the first defendant to commit such infringement. The liability of the third and fourth defendants would, therefore, fall within the second limb of s. 36(1) of the Copyright Act.

Whether There Was Unlawful Interference

[73] Counsel for the plaintiff contended that as a result of the defendants' conduct, there had been unlawful interference with the plaintiff's trade and business.

[74] The tort of unlawful interference with a person's trade was expounded by Zakaria Yatim J (as he then was) in *H & R Johnson (Malaysia) Bhd v. H & R Johnson Tiles Limited & Anor* [1995] 2 CLJ 581; [1995] 2 AMR 1390, and in *Megnaway Enterprise Sdn Bhd v. Soon Lian Hock* [2009] 8 CLJ 130; [2009] 3 MLJ 525, where Low Hop Bing J, in the latter case, listed the following four elements of the tort of unlawful interference with a person's trade:

> The elements which constitute the tort of unlawful interference with trade or business are:
>
> (1) Interference with the plaintiff's trade or business;

(2) Unlawful means;

(3) Intention to injure the plaintiff; and

(4) The plaintiff is injured thereby.

[75] It is my finding that the plaintiff had discharged the legal burden on a balance of probabilities that the defendants had committed the tort of unlawful interference with plaintiff's business. This decision is premised on the following evidence and reasons:

(i) Defendants had interfered with plaintiff's business by copying the plaintiff's FLEXILITE POS software, and changing the FLEXILITE POS software logo to that of the first defendant's company logo, and presenting it as their own.

(ii) The defendants had done this deliberately and intentionally, in the absence of any form of joint development between the plaintiff and the first defendant; and

(iii) The plaintiff was injured by the above unlawful interference by the defendants, since the plaintiff had expended a great deal of time, money, and effort to develop the FLEXILITE POS software.

The Reliefs Sought

[76] The law pertaining to the relief that the plaintiff was entitled to in relation to copyright infringement is provided for in s. 37 of the Copyright Act, which reads:

> Section 37 - Action by owner of copyright and relief
>
> (1) Infringements of copyrights and the prohibited acts under sections 36A and 36B shall be actionable at the suit of the owner of the copyright and, in any action for such an infringement or prohibited act, the court may grant the following types of relief:
>
> (a) an order for injunction;
>
> (b) damages;
>
> (c) an account of profits;
>
> (d) statutory damages of not more than twenty-five thousand ringgit for each work, but not more than five hundred thousand ringgit in the aggregate; or
>
> (e) any other order as the court deems fit.
>
> ...
>
> (7) Where in an action under this section an infringement of copyright or the commission of a prohibited act under section 36A or 36B is established, the court may, in assessing damages for the infringement or

commission of the prohibited act, award such additional damages as it may consider appropriate in the circumstances if it is satisfied that it is proper to do so having regard to:

(a) the flagrancy of the infringement or prohibited act;

(b) any benefit shown to have accrued to the defendant by reason of the infringement or prohibited act; and

(c) all other relevant matters.

(8) In awarding statutory damages under paragraph (1)(d), the court shall have regard to:

(a) the nature and purpose of the infringing act or prohibited act, including whether the infringing act or prohibited act was of a commercial nature or otherwise;

(b) the flagrancy of the infringement or prohibited act;

(c) whether the defendant acted in bad faith;

(d) any loss that the plaintiff has suffered or is likely to suffer by reason of the infringement or prohibited act;

(e) any benefit shown to have accrued to the defendant by reason of the infringement or prohibited act;

(f) the conduct of the parties before and during the proceedings;

(g) the need to deter other similar infringement or prohibited act; and

(h) all other relevant matters.

[77] I allowed the following items in (a) to (d) of para. 33 of the statement of claim:

(i) A declaration that the defendants had infringed the plaintiff's copyright in the FLEXILITE POS software;

(ii) An injunction to prevent the defendants from using or dealing in any way whatsoever, the XPOSMART WIFIPOS software;

(iii) An order for the defendants to publish in the China Press and Sin Chew, within 14 days, an apology to be approved by the plaintiff; and

(iv) An order for the plaintiff to be given the liberty to use any document as a result of obtaining this order, for the further protection of its rights in any action in Malaysia, or elsewhere;

[78] With regard to sub-paras. (e), (f), (g) and (h) of para. 33 of the statement of claim, relating to damages, modifications were made. In relation to the plaintiff's relief for exemplary damages, I was guided by *Rookes v. Barnard* [1964] AC 1129, and I took note of the fact that despite clear and undisputed documentary evidence, the defendants, especially the third defendant, had adduced evidence which, in my view was misleading and a

blatant evasion of the truth. However, since the plaintiff claimed additional damages pursuant to s. 37(7) of the Copyright Act, I was of the view that a global sum of RM200,000 for both additional and exemplary damages was a fair and just amount.

[79] Further to additional and exemplary damages, the following reliefs were granted:

(i) damages based on the accounts of profits attributable to the infringement, pursuant to s. 37(3) of the Copyright Act;

(ii) statutory damages to be assessed based on the number of infringing copies to be ascertained.

Conclusion

[80] Based on the aforesaid reasons, and after judicious consideration of all the evidence before this court, both oral and documentary, and submissions of counsel for both parties, the plaintiff's claim was allowed (subject to the modifications made to the damages sought) with costs in the amount of RM30,000 (subject to allocatur fees).